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10 Attorneys for Defendant Michael Vannak Khem Misiewicz

11 UNITED STATES DISTRICT COURT
 12 SOUTHERN DISTRICT OF CALIFORNIA
 13 (HONORABLE JANIS L. SAMMARTINO)
 14

15 UNITED STATES OF AMERICA,)	Criminal No. 13CR3782-JLS
)	Criminal No. 15CR00033-JLS
)	
16 Plaintiff,)	Date: March 27, 2015
)	Time: 2:00 p.m.
17 v.)	
)	SUPPLEMENTAL MEMORANDUM OF
18 MICHAEL VANNAK KHEM MISIEWICZ,)	POINTS AND AUTHORITIES IN
)	SUPPORT OF MOTION FOR DISCOVERY
19 Defendant.)	
)	
20)	

21 I.

22 **STATEMENT OF FACTS**

23 **A. Allegations and Procedural History**

24 The allegations in 13CR3782 and 15CR0033 (hereinafter,
 25 "Related Cases")¹ arise from an investigation by the Department of
 26

27 ¹ The government did not move to dismiss the Information in 13CR3782
 28 when Commander Misiewicz was arraigned on the Indictment in 15CR00033. In
 subsequent correspondence the government has indicated it will not

1 Justice ("DOJ"), the Naval Criminal Investigative Service ("NCIS"), the
2 Defense Contract Audit Agency ("DCAA") and Defense Criminal
3 Investigation Service ("DCIS") that focused initially on Leonard
4 Francis and his company Glenn Defense Marine Asia ("GDMA"). Francis
5 and GDMA have conducted business with the Navy for more than 25 years.
6 The investigation revealed that Francis and GDMA engaged in widespread
7 fraud and corruption while providing ship husbanding services under
8 contracts with the Navy. On January 15, 2015 Francis and GDMA pleaded
9 guilty to conspiracy to commit bribery, bribery and conspiracy to
10 defraud the United States.² The amount of loss to the United States
11 admitted to in the Francis plea agreement was well in excess of \$20
12 million.

13 In the course of the investigation into Francis and GDMA
14 Commander Misiewicz became the subject of a bribery inquiry. The
15 allegations in the Related Cases focus on the period between May 2010
16 and September 2013. During that time Commander Misiewicz served,
17 first, as the Commanding Officer of the USS Mustin forward deployed in
18 the Seventh Fleet, and later as the Deputy Operations Officer for the
19 US Commander Seventh Fleet embarked aboard the USS Blue Ridge. During
20 the course of his 28 years in the Navy, Commander Misiewicz's
21 outstanding efforts were repeatedly recognized, including his award of
22 the Legion of Merit in December 2012, an award normally reserved for

23
24 dismiss the Information in 13CR3782 until after trial.

25 ² Defendants in six related cases arising from the same investigation
26 have also pled guilty in this Court. See *United States v. Beliveau*,
27 13CR3781, *United States v. Aruffo*, 14CR1924, *United States v. Sanchez*,
28 13CR4287, and *United States v. Dusek*, 15CR0131, *United States v. Layug*,
14CR1354. Misiewicz is believed to be the only currently charged
defendant in this court who has not pleaded guilty.

1 much more senior officers.

2 It is alleged that Commander Misiewicz was bribed with cash,
3 gifts, travel expenses, entertainment and prostitutes.

4 **B. Criminal Case No. 13CR3782**

5 On September 13, 2013 Commander Misiewicz was charged along
6 with co-defendant Leonard Francis in a sealed one count complaint with
7 conspiracy to commit bribery in violation of 18 U.S.C. § 371. That
8 complaint was unsealed on September 17, 2013. An information alleging
9 conspiracy to commit bribery was filed on October 15, 2013
10 (hereinafter, "Information." The same day Commander Misiewicz entered
11 a not guilty plea.

12 The conspiracy is alleged to have begun in May 2010 and
13 continued to December 2012. The government alleges:

14 It was the object of the conspiracy for FRANCIS to offer and
15 provides things of value to or on behalf of MISIEWICZ,
16 including travel expenses, entertainment, and prostitutes in
17 return for MISIEWICZ providing classified and other internal
U.S. Navy information to FRANCIS, and being influenced in the
performance of his official acts.

18 *Information*, ¶ 6. Two overt acts are alleged: Francis paying airfare
19 for Commander Misiewicz to travel to Cambodia in June 2011 and
20 Commander Misiewicz e-mailing Francis certain internal U.S. Navy ship
21 movement schedules for on or about July 4, 2011. *Id.*, ¶ 8.

22 **C. Criminal Case No. 15CR00033**

23 On January 6, 2015 the government filed an indictment
24 alleging one count of conspiracy to commit bribery (18 U.S.C. §§ 371)),
25 seven counts of bribery (18 U.S.C. § 201(b)(2)(A) and (C)), and
26 criminal forfeiture (28 U.S.C. 2461(c)) (hereinafter, "Indictment").
27 Commander Misiewicz was arraigned on the Indictment on January 16, 2015
28 and pled not guilty.

1 The dates of the alleged conspiracy are from on or about
 2 early 2011 to September 2013. *Indictment*, ¶ 8. As alleged in the
 3 Indictment:

4 It was the object of the conspiracy for Misiewicz to provide
 5 Francis with classified and other proprietary, internal U.S.
 6 Navy information, to use his position and influence with the
 7 U.S. Navy to advocate for and advance the interests of
 8 Francis and GDMA, as opportunities arose, and in return for
 Francis, GDMA, and others to give things of value to or on
 behalf of MISIEWICZ, including cash, gifts, travel expenses,
 entertainment, and the services of prostitutes.

9 Indictment, ¶ 9. There are 24 overt acts alleged between February 2011
 10 and July 19, 2013. They include allegations that Commander
 11 Misiewicz(1) provided classified navy ship schedules, and (2) advocated
 12 for routing U.S. Navy ships to ports that were most advantageous to
 13 Francis and GDMA. In the individual bribery counts it is alleged that
 14 Commander Misiewicz received travel expenses, cash, hotel stays and
 15 prostitutes in return for being influenced in his official duties.

16 II.

17 DISCOVERY REQUESTS

18 At this time Commander Misiewicz withdraws the discovery
 19 motion previously filed in 13CR3782 on November 26, 2013 (docket number
 20 66). Further, with respect to the discovery motion filed in 15CR00033
 21 on January 23, 2015 and filed concurrently today in 13CR3782, the
 22 defense will not pursue discovery items 9-13, and 18 at this time, but
 23 reserves the right to pursue some or all of them at a later date.
 24 Currently at issue are Requests 1-8, 14-17, 19 and 20.³

25 ///

26 ///

27 ³ For ease of reference these discovery requests are set forth in
 28 Exhibit "A," attached hereto.

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III.

THE ITEMS IN DEFENDANT'S MOTION FOR DISCOVERY ARE MATERIAL TO THE
PREPARATION OF THE DEFENSE

A. The Scope of Rule 16(a)(1)(E)(I)

Discovery is governed by Rule 16 of the Federal Rules of
Criminal Procedure.

Rule 16 []grants defendants a broad right to discovery,
providing that "[u]pon a defendant's request, the government
must permit the defendant to inspect and to copy or
photograph . . . documents . . . within the government's
possession, custody, or control . . . [that are] material to
preparing the defense" Fed. R. Crim. P.
16(a)(1)(E)(I).

United States v. Doe, 705 F.3d 1134, 1150(9th Cir. Cal. 2013).

A defendant must make a threshold showing of materiality,
which requires a presentation of facts which would tend to
show that the Government is in possession of information
helpful to the defense. Rule 16 permits discovery that is
relevant to the development of a possible defense.

United States v. Muniz-Jaquez, 718 F.3d 1180, 1183-1184(9th Cir.
2013)(internal citations and quotations omitted).

B. Elements Of The Offenses

Commander Misiewicz is charged with conspiracy to commit
bribery and bribery in violation of 18 U.S.C.201(b)(2)(A) and (C) and
18 U.S.C. § 371. Under 18 U.S.C. § 371 one is guilty of conspiracy to
commit an offense against the United States where: "[T]wo or more
persons conspire to commit any offense against the United States..., or
any agency thereof in any manner or for any purpose..." In relevant
part, the bribery statute states that one is guilty of bribery if that
person:

[B]eing a public official... directly or indirectly,
corruptly demands, seeks, receives, accepts, or agrees to
receive or accept anything of value personally or for any
other person or entity, in return for (A) being influenced in
the performance of any official act; ... or (C) being induced

1 to do or omit to do any act in violation of the official duty
2 of such person.

3 18 U.S.C. 201 (b) (2) (A) (C). According to the Ninth Circuit Manual
4 Model of Criminal Jury Instructions, the elements of the offense of
5 bribery are:

6 First, the defendant was a public official;

7 Second, the defendant [solicited] [received] [agreed to
8 receive] something of value,... in return for being
9 influenced in the performance of an official act [or] ...
being persuaded to do or not to do an act in violation of
defendant's official duty; and

10 Third, the defendant acted *corruptly*, that is, intending to
11 be influenced in the performance of an official act [or] to
do or to omit to do an act in violation of the defendant's
official duty.

12 *Model Instruction 8.13* (emphasis added); *see, also, United States v.*
13 *Dorri*, 15 F.3d 888 (9th Cir. 1994) (same). For the person alleged to be
14 on the receiving end of a bribe:

15 Bribery requires intent... 'to be influenced' in an official
16 act... In other words, for bribery there must be a *quid pro*
17 *quo* - a specific intent to give or receive something of value
in exchange for an official act.

18 *United States v. Sun Diamond Growers*, 526 U.S. 398, 404-405 (1999).
19 *See, also, United States v. Garrido*, 713 F.3d 985, 996-997, (9th Cir.
20 2013) (A quid pro quo in bribery is the "specific intent to give or
21 receive something of value in exchange for an official act."). "[T]he
22 term corruptly under the bribery sections of § 201 refers to the
23 defendant's intent to be influenced to perform an act in return for
24 financial gain." *United States v. Leyva*, 282 F.3d 623, 626 (9th Cir.
25 2002) (citation omitted). "The requisite 'corrupt' intent has been
26 defined as incorporating a concept of the bribe being the prime mover
27 or producer of the official act." *United States v. Strand*, 574 F.2d
28 993, 995 (9th Cir. 1978) (internal citations and quotations omitted).

1 **C. The Defense**

2 Commander Misiewicz did not act "corruptly." There was no
 3 *quid pro quo*. *Garrido*, 713 F.3d at 996-997. Any alleged benefits
 4 Commander Misiewicz received from Francis and GDMA, were not "the prime
 5 mover or producer of the official act." *Strand*, 574 F.2d at 995.
 6 Rather, consistent with his 28 years of dedicated, meritorious service,
 7 each and every official act by Commander Misiewicz was taken in his
 8 belief that it was in the best interest of the Navy.

9 The focus of the allegations appears to be that, in exchange
 10 for enumerated benefits: (1) Commander Misiewicz used his influence to
 11 sway decisions about ship port visits in ways favorable to Francis and
 12 GDMA; and (2) he provided confidential information to Francis and GDMA
 13 in the form of ship schedules. Below, the defense explains how his
 14 defense requires the discovery he seeks.

15 **1. Influence On Port Visits Decisions**

16 The government alleges that Commander Misiewicz was bribed
 17 "to use his position and influence with the U.S. Navy to advocate for
 18 and advance the interests of Francis and GDMA, as opportunities arose."
 19 *Indictment*, ¶ 9. It is also alleged he was bribed into "providing
 20 classified and other internal U.S. Navy information to FRANCIS [and]
 21 being influenced in the performance of his official acts." *Information*,
 22 ¶ 6. It is further alleged that the enumerated overt acts, "among
 23 others," form the basis of the conspiracy. *Indictment*, ¶ 11 (emphasis
 24 added).

25 The allegations are vague. However, in paragraphs 11(e) and
 26 (u) of the Indictment the government has specifically alleged Commander
 27 Misiewicz exercised his influence on ship port visits. Further,
 28

1 reference to other pleadings in the Related Cases and a Press Release
 2 by the United States Attorney's Office on September 17, 2013 provide
 3 context for the government's conspiracy allegations. On September 17,
 4 2013 the government summarized its allegations concerning Commander
 5 Misiewicz to include:

6 As the deputy operations officer Misiewicz had high-level
 7 exposure to the operational planning for ships in the Seventh
 8 Fleet and for any U.S. Navy ship traveling through the
 9 Seventh Fleet's area of responsibility. He also held
 influence in determining or modifying the schedule of port
 visits for U.S. Navy vessels.⁴

10 Elsewhere in the Press Release it states:

11 Misiewicz also operated as an advocate within the Navy for
 12 GDMA's interests, urging decisions about port visits and
 contractor usage that were designed to benefit GDMA.

13 *Press Release* p. 2. The Complaint, filed in 13CR3782 on September 13,
 14 2013 (docket #1), catalogs alleged exercises of Commander Misiewicz's
 15 influence, for the benefit of Francis and GDMA, to swing port visits to
 16 Port Klang, Malaysia, Laem Chabang, Thailand, and Phuket Thailand.
 17 Complaint ¶¶ 19, 20-21, 23, 24, 28-29, 32, 34⁵

18 Commander Misiewicz's defense to these allegations is
 19 precisely that he *did* "[have] high-level exposure to the operational
 20 planning for ships in the Seventh Fleet and for any U.S. Navy ship

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 22 ⁴ A copy of the September 17, 2013 press release (hereinafter, "Press
 Release") is attached as Exhibit "A."

23 ⁵ The defense recognizes that the Press Release and the Complaint in
 24 13CR3782 are not operative charging documents. They are referenced in
 25 the belief that they allege facts and posit theories that the government
 26 likely will advance at trial. If the government's theory of the
 27 conspiracy is now different, and does not include Commander Misiewicz's
 28 alleged corrupt attempts to influence port visits, the defense requests
 clarification on how, other than the enumerated acts, Commander Misiewicz
 allegedly "[used] his position and influence with the U.S. Navy to
 advocate for and advance the interests of Francis and GDMA, as
 opportunities arose."

1 traveling through the Seventh Fleet's area of responsibility."
2 Whatever influence he exerted in the decision making process on the
3 issue of port visits was consistent with - and a result of -
4 "operational planning," not any desire or attempt to assist Francis or
5 GDMA.

6 In his defense, Commander Misiewicz must be allowed to
7 explain and present evidence concerning "operational planning." The
8 process involves consideration of, among other things, the historical
9 patterns of port visits, partnership building strategies with other
10 countries, theater security, port threat assessment, port protection
11 plans, response to dynamic events in the region, and quality liberty
12 opportunities for the sailors. The fact that transiting carriers have
13 limited time to spend in the Pacific *en route* to the Middle East also
14 has to be balanced against the opportunity cost of losing time for
15 operations at sea when taking the shortest transit paths. Finally,
16 although there was much internal debate within the Naval Command about
17 Francis and GDMA, the quality of GDMA's longtime service to the Seventh
18 Fleet weighed in the balance.

19 It does not matter if the government seeks to introduce
20 evidence of Commander Misiewicz's influence on one port visit decision
21 or many, the same discovery is necessary. The decision making process
22 was the same, and the decision concerning any one port visit was not
23 made in a vacuum: each decision was made in the context of overarching
24 strategic goals and in reference to decisions regarding other port
25 visits over a period of time.

26 Defendant's Discovery Requests 1-8, 14, 16 and 19 specifically
27 seek material relevant to this "operational planning" process, in
28

1 general, and to the specific considerations outlined above. Material
2 responsive to these requests will show that Commander Misiewicz's
3 recommendations regarding port visits were the product of careful
4 consideration of appropriate factors, consistent with historical
5 practices, and supported by many others who participated in the
6 decision making process.

7 Moreover, even if Commander Misiewicz did not see the
8 documents or materials requested, they are discoverable. To the extent
9 they identify issues, persons and opinions that were involved in the
10 decision making process, it is relevant to the preparation of the
11 defense. Where information consistent with Commander Misiewicz's
12 position is produced, it will identify potential witnesses and provide
13 circumstantial evidence supporting his official actions. If it is
14 adverse to his position, that will also assist in the formulation of
15 his defense.

16 **2. Ship Schedules/Port Visit Plans**

17 The government has alleged that Commander Misiewicz corruptly
18 provided Francis and GDMA with ship schedules the government has
19 sometimes termed "classified," and at other times called
20 "confidential." Commander Misiewicz did not provide Francis and GDMA
21 with classified or confidential documents; rather, he provided lists of
22 anticipated port visits (sanitized to exclude, from classified/
23 confidential documents, information concerning strategic objectives and
24 operational exercises at sea). Commander Misiewicz disclosed
25 anticipated port visit plans in a climate where, it was widely
26 recognized, there were exorbitant costs associated with delayed notice
27 of port visits to husbanding service providers. It was also a climate
28

1 where there was considerable discussion about the benefits of advance
 2 disclosure of port visits for strategic reasons. When he disclosed
 3 anticipated port visit plans to Francis and GDMA, Commander Misiewicz
 4 provided advance notice, not to an unknown entity, but to a contractor
 5 who had been entrusted with providing ship and crew security for Navy
 6 port visits in the region, ensuring the safety and quality of life for
 7 countless sailors and Marines, for more than 25 years.

8 Defendant's Discovery Requests 14, 15, 19 seek information
 9 relevant to the defense on this issue.

10 IV.

11 THE REQUESTED DISCOVERY IS IN THE CUSTODY AND CONTROL 12 OF THE GOVERNMENT

13 The government has previously taken the position that it is
 14 "neither obligated, nor able" to access documents and items in the
 15 possession of the U.S. Navy in order to respond to Commander
 16 Misiewicz's discovery requests.⁶ This position is unsupportable.

17 In *United States v. Bryan*, 868 F.2d 1032 (9th Cir. 1989) the
 18 Court determined that the prosecution had to turn over documents not
 19 only in its possession, but also in the possession of "closely
 20 connected government agencies." *Id.*, at 1036. Its holding rested, in
 21 part on notions of fairness.

22 [W]e do not believe that adopting a mechanical definition of
 23 "government" that would deny to the defendant documents
 24 accessible to the prosecution would reflect a fair balance of
 25 the competing concerns of the government and the defendant in
 26 this case...The prosecutor will be deemed to have knowledge
 27 of and access to anything in the possession, custody or
 28 control of any federal agency participating in the same
 investigation of the defendant.

⁶ See, 13CR3782, United States' Response In Opposition To Defendant's
 Discovery Requests, docket # 92 at p. 16.

1 *Id.* Similarly, in *United States v. Deutsch*, 475 F.2d 55, 57 (5th Cir.
2 1973 the Fifth Circuit held that the government was required to turn
3 over documents in the possession of the U.S. Postal Service in response
4 to a defendant's request where an attempt was made to bribe a Postal
5 worker. The Court reasoned:

6 It was a Postal Office employee who had been sought to be
7 bribed. The government cannot compartmentalize the
8 Department of Justice and permit it to bring a charge
9 affecting a government employee in the Post Office and use
 him as its principal witness, but deny having access to the
 Post Office files.

10 *Id.* The prosecution could not claim "different 'arms' of the
11 government, particularly when so closely connected as this one for the
12 purposes of case, as severable entities." *Id.*; *See, also, United*
13 *States v. Bailleaux*, 685 F.2d 1105, 1113 (9th Cir. 1982) (prosecution
14 required to turn over documents in the possession of the FBI); *United*
15 *States v. Poindexter*, 727 F. Supp. 1470, 1477 (D.D.C. 1989) ("Courts
16 have in the main been more concerned with fairness to the defendant, on
17 the one hand, and the government's ease of access to the documents
18 sought, on the other, than with the issue whether the documents are
19 actually within the physical possession of the prosecutor.").

20 Over a period of years the prosecution team has been able to
21 obtain documents and tangible objects from the Navy in order to
22 prosecute at least seven individuals and entities in this Court alone
23 who were either Naval personnel or Navy contractors. Their
24 investigation has involved NCIS, DCAA, and DCIS, all of whom have had
25 access to Navy documents for the purposes of prosecution. It is now
26 disingenuous to claim that they are unable to obtain documents from the
27 from the U.S. Navy. Moreover, to the extent that the government
28 argues that it is too burdensome to go through the Naval records,

1 Commander Misiewicz has identified individual files and networks where
2 he believes the documents likely will be found. By separate letter to
3 counsel, the defense will identify these file locations for the
4 government.

5
6 **V.**

7 **CONCLUSION**

8 For the reasons stated above, Commander Misiewicz
9 respectfully requests that the Court grant his motions, and accord such
10 other relief as seems just.

11
12 Respectfully submitted,

13 Dated: March 13, 2105

/S/ Mark F. Adams

Mark F. Adams

14 Dated: March 13, 2015

/S/ Wendy S. Gerboth

Wendy S. Gerboth

15 Attorneys for Michael Vannak Khem
16 Misiewicz
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